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# The Uncertain Future of Sentencing Guidelines

Richard S. Frase\*

## I. Introduction

As of the fall of 1993, at least 15 states and the federal government had adopted or were in the process of adopting sentencing guidelines developed by an independent sentencing commission.<sup>1</sup> Minnesota pioneered this approach to sentencing reform in 1978.<sup>2</sup> Its guidelines have now been in effect for more than a decade, and they have been more extensively studied and evaluated than any other system.<sup>3</sup> In addition, many observers believe that the Minne-

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\* Benjamin N. Berger Professor of Criminal Law, University of Minnesota. This article is an expanded and updated version of the lecture Professor Frase gave at the Law School on February 4, 1992, to inaugurate the Benjamin N. Berger Professorship.

1. See 6 FED. SENTENCING REP. (forthcoming). Besides Minnesota, other states with commission-based sentencing guidelines include Arkansas, Delaware, Florida, Kansas, Louisiana, Michigan, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Washington, and Wisconsin. In addition, the American Bar Association has recently renewed and strengthened its support for Minnesota-type, commission-based guidelines. A.B.A. STANDARDS FOR CRIMINAL JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES AND APPELLATE REVIEW OF SENTENCES, Standards 18-4.1 to 18-4.4 (Third Edition, approved February 9, 1993), reprinted in 52 CRIM. L. REP. 2353, 2363 (1993). See *infra* text accompanying note 186.

2. See 1978 Minn. Laws ch. 723 (Guidelines enabling statute). The initial version of the Guidelines was contained in MINN. SENTENCING GUIDELINES COMM., REPORT TO THE LEGISLATURE (1980) [hereinafter 1980 Commission Report]. The current version of the Guidelines can be found at MINN. STAT. ANN. ch. 244, §§ I-V (Appendix) (West 1993) and also at MINN. R. CT., MINN. SENTENCING GUIDELINES AND COMMENTARY, §§ I-V (West 1993) [hereinafter GUIDELINES].

3. See, e.g., MINN. SENTENCING GUIDELINES COMMISSION, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION (1984) [hereinafter 1984 COMMISSION REPORT]; DALE PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988); Richard S. Frase, *Implementing Commission-based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. L. & PUB. POL'Y 279 (1993) (evaluating success of the Guidelines, through 1989, in achieving the Commission's stated or apparent goals) [hereinafter Frase 1993a]; Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 WAKE FOREST L. REV. 345 (1993) [hereinafter Frase 1993b]; Kay A. Knapp, *What Sentencing Reform in Minnesota Has and Has Not Accomplished*, 68 JUDICATURE 181 (1984); Terance D. Miethe, *Charging and Plea Bargaining Practices under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155 (1987); Charles A. Moore & Terance D.

sota Sentencing Guidelines remain one of the better-designed and successful systems of this type.<sup>4</sup> Ironically, the more-recently-enacted Federal Sentencing Guidelines may be the *worst* example,<sup>5</sup> and they have certainly received the most recent attention.<sup>6</sup> It thus seems appropriate to turn our attention away from the Federal Guidelines, for the moment, and consider how the original prototype is doing; all sentencing guidelines systems are *not* the same.

It is particularly important to consider the Minnesota Sentencing Guidelines at this point in their history because of another irony: at the very moment when Minnesota's guidelines are being widely praised and copied by other states, they continue to face attack in Minnesota. The Guidelines have been criticized from many points of view: by conservatives, liberals, academics, members of the public, and judges.<sup>7</sup>

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Miethe, *Regulated and Unregulated Sentencing Decisions: An Analysis of First-Year Practices Under Minnesota's Felony Sentencing Guidelines*, 20 LAW & SOC'Y REV. 253 (1986); Terance D. Miethe & Charles A. Moore, *Socio-Economic Disparities under Determinate Sentencing Systems: A Comparison of Pre-guideline and Post-guideline Practices in Minnesota*, 23 CRIMINOLOGY 337 (1985); Terance D. Miethe & Charles A. Moore, *Can Sentencing Reform Work? A Four-Year Evaluation of Determinate Sentencing in Minnesota* (1987) (unpublished paper presented at the 1987 Annual Meeting of the American Society of Criminology, copy on file with the author).

Dale Parent's book is reviewed and updated (through 1988) in Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After*, 75 MINN. L. REV. 727 (1991) [hereinafter Frase 1991a]. See also Debra L. Dailey, *The Sentencing of Sex Offenders Under the Minnesota Sentencing Guidelines: Is There a Need for Change?* 10 HAMLINE J. PUB. L. & POL'Y 193 (1989); SYMPOSIUM ON DETERMINATE SENTENCING, 5 HAMLINE L. REV. 161-437 (1982) (articles and research projects on Minnesota Guidelines).

4. See, e.g., Frase 1993b, *supra* note 3, at 364-66 (finding the Guidelines substantially achieved their stated goals); Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 COLO. L. REV. 713, 717-20 (1993) (commenting on the widespread support for Minnesota-like guidelines and their ability to reduce sentencing disparity and control growth in prison populations); Michael H. Tonry, *Structuring Sentencing*, 10 CRIME & JUST., 267, 286-87 (1988); Andrew Von Hirsch & Judith Greene, *When Should Reformers Support Creation of Sentencing Guidelines?* 28 WAKE FOR. L. REV. 329-34 (1993).

5. See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1741-47 (1992); Gerald W. Heaney, *The Reality of Guideline Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Michael Tonry, *The Failure of the U.S. Sentencing Commission's Guidelines*, 39 CRIME & DELINQ. 131 (1993).

6. See, e.g., Symposium, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 181 (1993) (8 of 11 articles deal with Federal Guidelines); Symposium on *Federal Sentencing*, 66 S. CAL. L. REV. 99 (1992); Symposium, *Punishment*, 101 YALE L.J. 1681 (1992) (three articles on Federal Guidelines); Symposium, *Making Sense of the Federal Guidelines*, 25 U.C. DAVIS L. REV. 563 (1992); *Federal Sentencing Guidelines Symposium*, 29 AM. CRIM. L. REV. 771 (1992).

7. See *infra* text accompanying notes 47-60.

In this article, I will summarize the principal recent criticisms of guidelines sentencing, focusing on those most applicable to the Minnesota system. I will then argue that these criticisms are based on misunderstandings of how the Minnesota Sentencing Guidelines actually work and what they have actually accomplished. The truth is that the Guidelines have achieved most of their major intended goals, and remain a model of rational and effective sentencing, worthy of retention in Minnesota, and of emulation by reformers in other states and at the Federal level.<sup>8</sup> The Guidelines balance uniformity and flexibility, give appropriate weight to all of the traditional purposes of punishment, and reconcile public demands for increased severity with the reality of limited correctional resources. In each of these key dimensions of sentencing — allowable discretion, punishment goals, and sanction severity — the Minnesota Sentencing Guidelines have been criticized from “both sides.” These conflicting critiques suggest not that the Guidelines have failed, but rather that they succeeded in achieving an appropriate and stable compromise on these inherently controversial issues of sentencing policy. This careful balance is the key to the success of the Minnesota Guidelines, and to the failure of their Federal counterpart.

This article was originally delivered as a lecture to an audience composed largely of non-lawyers and lawyers who do not specialize in sentencing.<sup>9</sup> In revising it for publication, I have tried to retain the lecture’s non-technical tone. Although my conclusions should interest sentencing reformers and scholars, it is even more important that they be heard and understood by non-specialized legislators, governors, and other policy makers in Minnesota and elsewhere. This published version also reflects data on the Guidelines developments which has become available since the date of the original lecture.<sup>10</sup> In some respects, my conclusions are more

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8. The Clinton administration will have the opportunity to fill several positions on the U.S. Sentencing Commission, and major revisions of the Federal Guidelines have recently been proposed. See, e.g., Freed, *supra* note 5, at 1740-52.

9. See *supra* note \*.

10. Frase 1993a, *supra* note 3, at 279-80 n.2 (describing the Minnesota Sentencing Guidelines Commission’s data-gathering program). The lecture version of this Article was based on calendar-year evaluation data sets through 1989. Since the date of the lecture, data sets have become available for 1990 and 1991. MINN. SENTENCING GUIDELINES COMM’N, SUMMARY OF 1990 SENTENCING PRACTICES FOR CONVICTED FELONS (1992) [hereinafter 1990 DATA SUMMARY]; MINN. SENTENCING GUIDELINES COMM’N, SENTENCING PRACTICES: HIGHLIGHTS AND STATISTICAL TABLES, FELONY OFFENDERS SENTENCED IN 1991 (1993) [hereinafter 1991 DATA SUMMARY].

In addition to these annual data summaries and other reports (e.g., 1984 COMMISSION REPORT, *supra* note 3), the Guidelines Commission has made its computerized data files available to outside researchers. In the remainder of this article, when statistical results are cited by year or data set only (e.g., “1991 EVALUATION

optimistic now than they were when the lecture was delivered. Although Minnesota's sentencing system continues to face serious criticism and challenge, it remains, in comparison to other American jurisdictions, a model.

### A. *How the Minnesota Sentencing Guidelines Work*

The Guidelines became effective May 1, 1980, and govern sentencing in all felony cases (crimes punishable with more than one year of imprisonment).<sup>11</sup> The heart of the Minnesota Sentencing Guidelines is the sentencing grid shown in Figure 1.<sup>12</sup> The Guidelines primarily determine whether a defendant should be sentenced to state prison, and if so, for how long. The two major determinants of this decision are the severity of the most serious conviction offense and the extent of the defendant's prior criminal record. These two factors are represented by the vertical and horizontal scales of the grid, respectively. A defendant's conviction offense and criminal history score place him or her in one of the cells of the grid. The number in the cell represents the duration of the recommended prison sentence in months.

The heavy black line running across the grid is called the disposition line:<sup>13</sup> in cells below this line, the Guidelines recommend that a prison sentence be immediately executed and that a defendant be committed to prison.<sup>14</sup> The single number at the top of those cells is the recommended or best sentence, but the two figures below that provide a range within which the sentence could fall and still be considered consistent with the Guidelines. Above the disposition line, the Guidelines generally recommend a stayed (i.e., suspended) prison sentence equal to the number of months shown in each cell.<sup>15</sup> A stayed prison sentence is conditional: it will not be served unless the defendant violates the terms of probation and the stay is revoked.<sup>16</sup> Stayed prison sentences are normally accompa-

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DATA SET"), rather than to any publication, such findings are based on the author's own analysis of the Commission's data, using the SPSS PC+ statistical program (version 4.01).

11. GUIDELINES, *supra* note 2, § I (Statement of Purposes and Principles); MINN. STAT. ANN. § 609.02, subd. 2 (West 1993) (felony definition).

12. GUIDELINES, *supra* note 2, § IV (Sentencing Guidelines grid).

13. 1980 COMMISSION REPORT, *supra* note 2, at 8.

14. GUIDELINES, *supra* note 2, § II.C (Presumptive Sentence).

15. *Id.* A few cases falling above the disposition line carry a presumptive executed prison term. GUIDELINES, *supra* note 2, § II.E (Mandatory Sentences). Most of these involve use or possession of a dangerous weapon, which is subject to mandatory minimum prison terms under a state statute. See MINN. STAT. ANN. § 609.11, subds. 4-9 (West 1993).

16. MINN. STAT. ANN. § 609.135 (West 1993) (Stay of Imposition of Sentence); GUIDELINES, *supra* note 2, § III.

**Figure 1**  
**Minnesota Sentencing Guidelines Grid**  
**Effective August 1, 1989**

**Presumptive Sentence Lengths in Months**

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

SEVERITY LEVEL OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE					
		0	1	2	3	4	5 or more
<i>Sale of a Simulated Controlled Substance</i>	I	12*	12*	12*	13	15	17 18-20
<i>Theft Related Crimes (\$2500 or less)</i>	II	12*	12*	13	15	17	19 20-22
<i>Check Forgery (\$200-\$2500)</i>							
<i>Theft Crimes (\$2500 or less)</i>	III	12*	13	15	17	19 18-20	22 21-21 24-26
<i>Nonresidential Burglary Theft Crimes (over \$2500)</i>	IV	12*	15	18	21	25 24-26	32 30-34 37-45
<i>Residential Burglary Simple Robbery</i>	V	18	23	27	30 29-31	38 36-40	46 43-49 50-58
<i>Criminal Sexual Conduct 2nd Degree (a) &amp; (b)</i>	VI	21	26	30	34 33-35	44 42-46	54 50-58 60-70
<i>Aggravated Robbery</i>	VII	48 44-52	58 54-62	68 64-72	78 74-82	88 84-92	98 94-102 104-112
<i>Criminal Sexual Conduct, 1st Degree</i>	VIII	86 81-91	98 93-103	110 105-115	122 117-127	134 129-139	146 141-151 153-163
<i>Assault, 1st Degree</i>							
<i>Murder, 3rd Degree</i>							
<i>Murder, 2nd Degree (felony murder)</i>	IX	150 144-156	165 159-171	180 174-186	195 189-201	210 204-216	225 219-231 234-246
<i>Murder, 2nd Degree (with intent)</i>	X	306 299-313	326 319-333	346 339-353	366 359-373	386 379-393	406 399-413 419-433

Under state statutes, 1st Degree Murder has a mandatory life sentence.

\* one year and one day

nied by several conditions such as: incarceration in a local jail for up to one year and/or required participation in a treatment program, supervision by a probation officer, community service, restitution to the victim, or payment of a fine.<sup>17</sup>

It is important to note that the Guidelines' recommendations as to execution and duration of prison terms are "presumptive,"<sup>18</sup> not mandatory. Thus, although a prescribed sentence is presumed to be correct, a court may depart from this recommendation if it finds that "substantial and compelling circumstances" call for a different sentence.<sup>19</sup> A judge must state his or her reasons for departing from the Guidelines.<sup>20</sup> Whether or not the sentence imposed is a departure, both the defendant and the prosecution may appeal the sentence.<sup>21</sup>

If a defendant does go to prison, either initially or later, following revocation of a stayed sentence, the prison term imposed will be reduced by up to one-third, for good behavior in prison.<sup>22</sup> Thus, a thirty-six month Guidelines sentence becomes a twenty-four month sentence if the defendant earns the maximum "good time" reduction. Any reduction the defendant earns becomes a period of post-prison supervision similar to the traditional parole term.<sup>23</sup> Thus, the defendant with the thirty-six month sentence who was released after twenty-four months would serve a twelve month Supervised Released Term. The conditions of release might include periodic contacts with a supervising officer, random drug tests, curfews, etc.<sup>24</sup> A violation of those conditions can result in the return of the defendant to prison to serve out his or her remaining term.<sup>25</sup>

### B. *Origins and Purposes of Sentencing Guidelines*

In order to understand the current status and future prospects of the Minnesota Sentencing Guidelines, one must understand how they evolved, what purposes they serve, and more fundamentally,

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17. GUIDELINES, *supra* note 2, § III.A (Establishing Conditions of Stayed Sentences); MINN. STAT. ANN. § 244.09, subd. 5 (West 1993); Minn. Sentencing Guidelines Comm., Report to the legislature on Intermediate Sanctions (1991) (*passim*).

18. GUIDELINES, *supra* note 2, § II.C.

19. GUIDELINES, *supra* note 2, §§ I, II.D.

20. MINN. STAT. ANN. § 244.10, subd. 2 (West 1993); GUIDELINES, *supra* note 2, § II.D.

21. MINN. STAT. ANN. § 244.11 (West 1993).

22. MINN. STAT. ANN. § 244.04 (West 1993) (provisions applicable from 1980 until August 1, 1993); MINN. STAT. ANN. § 244.101 (West 1993) (provisions applicable after August 1, 1993).

23. MINN. STAT. ANN. § 244.05 (West 1992).

24. MINN. STAT. ANN. §§ 244.05, subd. 6; 244.08 (West 1992).

25. MINN. STAT. ANN. § 244.05, subd. 3 (West 1992).

what purposes punishment itself may serve. Traditionally, four major purposes of punishment have been recognized: rehabilitation, incapacitation, deterrence, and retribution.<sup>26</sup> The first three are designed to prevent crime: rehabilitation does this through treatment and reform of offenders; incapacitation does it by imprisoning the most dangerous offenders, to restrain them from committing crimes against the public; deterrence discourages future crimes by a particular defendant and other would-be offenders through fear of punishment (and, in the long run, by using criminal penalties to define and reinforce important social values). The fourth goal, retribution, aims not to prevent crime but rather to give defendants their "just deserts" by imposing penalties directly proportional to the seriousness of an offense. One theory, "defining retributivism," seeks to scale punishment precisely to each defendant's "desert."<sup>27</sup> A more modest version of this theory, "limiting retributivism," merely sets upper and lower bounds — sentences must not be inhumane, nor excessively severe or unduly lenient. Within these outer limits, punishment is scaled according to what is needed to achieve crime-preventive goals.<sup>28</sup>

Prior to adoption of sentencing guidelines, the dominant purposes of punishment were rehabilitation and incapacitation. To achieve these goals, judges and parole boards were given substantial discretion to assess the treatability and dangerousness of each individual offender.<sup>29</sup> Under this system, known as "indeterminate sentencing,"<sup>30</sup> judges could impose any sentence from probation to the maximum prison term authorized by law. In addition, parole boards had broad discretion to decide how much of any imposed prison sentence would actually have to be served.<sup>31</sup>

In the early 1970s, however, a broad consensus began to develop that indeterminate sentencing was both ineffective and un-

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26. See KENT GREENAWALT, 4 *ENCYCLOPEDIA OF CRIME & JUSTICE* 1336-46 (1983) (defining "Punishment"); PETER W. LOW ET AL., *CRIMINAL LAW: CASES & MATERIALS* 1-28 (2d ed. 1986).

27. See NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 182-196 (1982); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 73-6, 78 (1974).

28. MORRIS, *Madness and the Criminal Law*, *supra* note 27, at 196-202; LOW ET AL., *supra* note 26, at 4, 7, 12-14, 25 n.b.

29. See 1 *RESEARCH ON SENTENCING: THE SEARCH FOR REFORM* 1-4 (Alfred Blumstein et al., eds., 1983); Franklin E. Zimring, *A Consumer's Guide to Sentencing Reform*, 4-15 (1977) [hereinafter Zimring 1977], reprinted in FRANKLIN ZIMRING & RICHARD FRASE, *THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW* 763-65, 933-39 (1980); PAUL TAPPAN, *CRIME, JUSTICE AND CORRECTION* 430-37 (1960), reprinted in ZIMRING & FRASE, *supra*, at 758-763.

30. BLUMSTEIN, ET. AL., *supra* note 29, at 2.

31. *Id.*



just.<sup>32</sup> Conservatives objected to lenient probation and parole release decisions which they believed resulted in less punishment than offenders deserved, failed to provide sufficiently certain and severe punishment to deter crime, and failed to incapacitate dangerous offenders.<sup>33</sup> Liberals also attacked indeterminate sentencing. They argued that the exercise of discretion by judicial and parole authorities led to unjust disparities and racial bias in the treatment of equally serious offenders.<sup>34</sup> In addition, prisoners themselves objected to the uncertainty imposed upon them by the parole system. In some states, such as California, a defendant convicted of a felony would not know upon entering prison whether he or she would be held there for one year or for life.<sup>35</sup>

At the same time, academics were increasingly questioning the indeterminate sentencing system. Some concluded that the individualized assessments of each offender's treatment needs, progress in treatment, and degree of dangerousness were too unreliable and produced too much disparity in sentencing. Most treatment programs (especially in-prison programs) could not be shown to be effective.<sup>36</sup> Other academics argued for a return to sentencing based primarily on a retributive, "just deserts" theory<sup>37</sup> — each offender should be punished in direct proportion to the seriousness of the harm caused by the offense and to his or her moral culpability in committing that offense, with little or no consideration given to crime prevention.

By the mid-1970s, a "bi-partisan" consensus had formed that discretion in sentencing must be substantially reduced, and that sentences should be made more uniform and more proportional.<sup>38</sup> All offenders who commit the same crime should receive substantially the same punishment. The severity of that punishment should be determined primarily by the seriousness of the defend-

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32. *See id.* at 1-4.

33. *Id.* (listing six factors associated with widespread dissatisfaction with indeterminate sentences).

34. *Id.*

35. *See* Zimring 1977, *supra* note 29, at 934.

36. FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); LOW ET AL., *supra* note 26, at 25-6.

37. *See generally* DAVID FOGEL, ". . . WE ARE THE LIVING PROOF. . ." *THE JUSTICE MODEL FOR CORRECTIONS* (1975); TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT — REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING* (1976); ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

38. BLUMSTEIN ET AL., *supra* note 29, at 3. *See also* Sheldon L. Messinger & Philip E. Johnson, *California's Determinate Sentencing Statute: History and Issues* (1977), reprinted in ZIMRING & FRASE, *supra* note 29, at 950-87 (describing the wide spectrum of political and social interest groups which shaped sentencing reform in California).

ant's offense, and secondarily by the extent of the offender's prior record. As a result of this consensus, states began to enact so-called "determinate" sentencing laws, which sharply limited judicial and/or parole board discretion. Some states (e.g., California)<sup>39</sup> adopted legislatively-prescribed sentences, specifying a narrow sentencing range for each offense, with minor adjustments for aggravating and mitigating circumstances.

In 1978, the Minnesota Legislature took a different approach.<sup>40</sup> Following the suggestions of a number of writers,<sup>41</sup> the Minnesota Legislature created a specialized administrative agency, the Sentencing Guidelines Commission, to develop and implement presumptively correct sentences for each combination of offense and offender characteristics.<sup>42</sup> The Commission was to be composed of judges, law enforcement and correctional officials, prosecution and defense attorneys, and members of the public.<sup>43</sup> The legislature directed the new Sentencing Guidelines Commission to take previous sentencing practices as well as existing correctional resources into substantial consideration in drafting the Guidelines.<sup>44</sup> Beyond this, the Legislature did not impose any particular theory of punishment, but instead seemed to be saying that sentencing should be more uniform and less discretionary in its pursuit of *all* of the traditional purposes of punishment.<sup>45</sup>

Since the Minnesota Guidelines took effect in 1980, they have been widely praised and copied. Many other states, and the federal government, adopted similar approaches of presumptive sentences promulgated by independent sentencing commissions.<sup>46</sup>

### C. *Do Sentencing Guidelines Have a Future?*

Considering the broad political and social consensus which led to sentencing guidelines and the many jurisdictions which have now adopted this approach, the future of sentencing guidelines

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39. Cal. Penal Code §§ 667.5, 1168, 1170, 1170.1a, 1170.1b, 2931, 3000, 12022, 12022.5-12022.7 (West 1976) (1976 California Determinate Sentencing Law), *excerpted in* ZIMRING & FRASE, *supra* note 29, at 796-803. *See also* BLUMSTEIN ET AL., *supra* note 29, at 189-91; Messinger & Johnson, *supra* note 38.

40. The legislative history of the Minnesota Guidelines Enabling Act, 1978 Laws ch. 723, and the Sentencing Commission's implementation of its statutory mandate, are described in PARENT, *supra* note 3. *See also* Frase 1993b, *supra* note 3, at 346-54.

41. The idea of an independent sentencing commission was apparently first proposed in MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

42. MINN. STAT. ANN. § 244.09 (West 1992).

43. MINN. STAT. ANN. § 244.09, subd. 2 (West 1992).

44. 1978 Minn. Laws ch. 723, sec. 9.

45. Frase 1993b, *supra* note 3, at 347-49.

46. *See supra* note 1.

would seem to be assured, especially in Minnesota. Yet, the Minnesota Sentencing Guidelines currently face some of their most serious challenges. In addition to calls for outright repeal of the Guidelines (which have been voiced intermittently ever since they were enacted), we are witnessing an increasing variety of less drastic proposals which would nevertheless destroy the careful political and public policy balance represented by the Guidelines, and would lead to a system which is far less effective and just.

### Recent critical writings and legislative trends

In June of 1991, the Minnesota Legislative Auditor issued a report concluding that the Minnesota Sentencing Guidelines are too inflexible, and that judges should be given more discretion.<sup>47</sup> Meanwhile, other critics were saying that the Minnesota Sentencing Guidelines do not go far enough in controlling judicial discretion.<sup>48</sup> In the fall of 1991, Professor Albert Alschuler of the University of Chicago Law School published a very critical article focusing primarily on the Federal Sentencing Guidelines, but seeming to call for the abandonment of *all* similar guidelines systems.<sup>49</sup> Alschuler argued that sentencing guidelines are inherently too rigid and too dominated by retributive, offense-based theories of punishment.<sup>50</sup> Again, other critics have made the opposite complaint: that Minnesota's guidelines are not retributive enough.<sup>51</sup>

Professor Alschuler also repeated two long-standing criticisms of guidelines. The first is that they give prosecutors too much control over sentences because a prosecutor's charges determine the severity of the charged crimes, thus affecting a defendant's placement on the grid.<sup>52</sup> The second criticism is that presumptive sentences are likely to cause sudden, drastic increases in sentencing severity in response to short-term public hysteria and "law and

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47. MINN. LEGISLATIVE AUDITOR, SENTENCING AND CORRECTIONAL POLICIES 101-102 (1991).

48. See, e.g., NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 28-32, 49-55 (1990) (Minnesota Guidelines should also specify aggregate severity ranges for conditions of stayed sentences); PARENT, *supra* note 3, at 209 (same critique). See also *infra* text accompanying notes 58-59 (proposed mandatory penalties).

49. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

50. *Id.* at 908-24; see also MINN. LEGISLATIVE AUDITOR, *supra* note 47, at 101.

51. See, e.g., PARENT, *supra* note 3, at 161-66; Miethe & Moore 1987, *supra* note 3, at 5-6; Kay A. Knapp, *Structured Sentencing: Building on Experience*, 72 JUDICATURE 46, 48 (1988).

52. See Alschuler, *supra* note 49, at 925-28; see generally Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

order" politics.<sup>53</sup> As Professor Frank Zimring stated, fifteen years earlier:

Once a determinate sentencing bill is before the legislative body, it takes no more than an eraser to make a one-year "presumptive sentence" into a six-year sentence for the same offense. The delicate scheme of priorities in any well-conceived sentencing proposal can be torpedoed by amendment with ease and political appeal.<sup>54</sup>

Moreover, the Guidelines produced "real time" sentences: Minnesota defendants are expected to serve at least two-thirds of a presumptive term.<sup>55</sup> Under the previous system of indeterminate sentencing, legislators could increase maximum statutory penalties, knowing that the latter were largely symbolic; few defendants served anything close to the maximum allowable term.<sup>56</sup>

Meanwhile, Minnesota has recently experienced just such a period of public hysteria over crime, with more and more calls for substantially increased sentencing severity.<sup>57</sup> One legislative proposal would have turned all of the Guideline's prison terms into mandatory minimum sentences, rather than presumptive sentences subject to adjustment both up and down.<sup>58</sup> Although such drastic reforms were not adopted, the Legislature has enacted more and more mandatory minimum prison terms for certain offenses.<sup>59</sup> At the same time, statutes enacted in 1989 through 1992 increased judicial and correctional discretion to consider the dangerousness and treatability of particular defendants.<sup>60</sup>

#### In defense of the Guidelines — two themes

Well, so what? No one ever expected the original version of the Minnesota Sentencing Guidelines to remain unchanged forever. Indeed, they must and should evolve and change over time. In my view, however, many of the recently proposed changes in the Guidelines and related sentencing laws are based on misunderstandings of how the Guidelines work. These proposals are likely to produce "reforms" which destroy much of what the Guidelines have

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53. Alschuler, *supra* note 49, at 929-38. See also Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655-77 (1993).

54. Zimring 1977, *supra* note 29, at 938.

55. See *supra* text accompanying note 22.

56. See, e.g., ZIMRING & FRASE, *supra* note 29, at 816, table 45 (data on average sentences imposed and time served, by offense).

57. See Frase 1993b, *supra* note 3, at 359-63 (describing these events).

58. See Donna Halvorsen, *IR Crime Plan Has Get Tough Focus*, STAR TRIB. (Minneapolis), January 10, 1992, at 1B.

59. Frase 1993b, *supra* note 3, at 360, 363.

60. *Id.* at 360-63.

achieved and will make sentencing in Minnesota more costly, less effective, and less just. As explained below, even small tinkering with the Guidelines, making them more "flexible" in some areas and more "mandatory" in others, have a serious potential for harmful consequences and would, if continued year after year, eventually produce the same effect as outright repeal. Repeal is not inconceivable; it is possible that, as happened in 1978, liberals and conservatives will once again come to a consensus (each for very different reasons, to be sure) in favor of drastic sentencing reform. It seems much more likely, however, that the Guidelines will not be repealed; instead, they may simply be — slowly but surely — nibbled to death.

The remainder of this Article will be devoted to two themes. The first theme, developed in Part II, is "myth and reality": common misconceptions which underlie recent criticisms of the Guidelines. Analysis of these criticisms with respect to three key dimensions of sentencing reveals their shallow and contradictory nature — myth and counter-myth:

- *control of judicial discretion*: some critics argue that sentencing guidelines are too rigid, while others (including the proponents of mandatory minimum sentences) argue that the guidelines are not rigid enough;
- *sentencing purposes*: some critics claim that Minnesota-style guidelines are too retributive; others say they are not retributive enough;
- *sentencing severity*: some critics believe that Minnesota Guidelines sentences are too lenient, while others argue that they are too severe — indeed, that determinate sentencing reforms *inevitably* lead to rapidly escalating sanction severity.

These mirror-image critiques often reflect opposing political perspectives, thus suggesting that the "strange bedfellows" liberal-and-conservative coalition which created the Guidelines in 1978 may indeed be about to re-emerge and abolish them. Moreover, attempts to fend off one side's critiques tend to add support to the other's. However, these charges and counter-charges can also be viewed in a positive light: as evidence that the Guidelines have struck an appropriate balance. In an area as emotional and politically-sensitive as sentencing, neither side can or *should* ever be completely satisfied; compromise is essential and unavoidable.

The second theme, discussed in Part III, examines the opposite side of the coin: the vitally important but often overlooked successes of the Minnesota Sentencing Guidelines. In responding to

critics of the Guidelines, it is all too easy to lose sight of their virtues, and of how much better Minnesota's sentencing and correctional system is than systems in other states, in the federal courts, and in Minnesota prior to the Guidelines. The Guidelines have been remarkably successful, not only in striking an appropriate balance with respect to sentencing discretion, purposes, and severity (Part II), but also in achieving three key goals: reduced sentencing disparity and racial bias, avoidance of prison overcrowding, and the promotion of more informed and comprehensive sentencing policy. The Article concludes with some thoughts about how to preserve these important accomplishments, and to maintain the Guidelines' careful balance.

## II. Minnesota Sentencing Guidelines - Myth and Reality

### A. Degree of Judicial Discretion

Myth: Guidelines do not Give Judges Enough Discretion  
(and Give Prosecutors too much)

Whatever our sentencing purposes may be — whether to select defendants for treatment or for incapacitation based on individualized assessments of each offender's background, or simply to impose each defendant's particular "just deserts" — some critics of guidelines sentencing argue that these decisions must be made by judges on an individualized basis, and cannot be made in the aggregate.<sup>61</sup> In other words, sentencing offenders in groups, or by any preconceived formula, is unjust and ineffective. Many of these critics also argue that Minnesota-style conviction-offense-based guidelines essentially turn the sentencing decision over to the prosecutor, and eliminate a court's ability to counteract unreasonable charging decisions.<sup>62</sup>

#### Judicial discretion

Sentencing guidelines are intended to be *less* flexible than the totally discretionary sentencing methods they replace. However, they are not inherently rigid or inflexible; all guideline systems permit judges to recognize exceptions. In Minnesota, about 20 percent of sentences are departures from the Guidelines.<sup>63</sup> About 10 percent of sentences are so-called "dispositional" departures — that is,

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61. See generally Alschuler, *supra* note 49.

62. See *infra* text accompanying notes 73-79.

63. 1991 EVALUATION DATA SET, *supra* note 10. The 20 percent figure in text includes durational departures in stayed - as well as executed - prison cases; if only executed-prison durational departures are included, the combined dispositional plus durational departure rate is 15.6 percent. *Id.*

either commitment to prison of a defendant with a presumptive stayed prison term (an "aggravated" dispositional departure), or a sentence of probation for a defendant with a presumptive executed prison term ("mitigated" departures). Mitigated dispositional departures are especially common.<sup>64</sup> Another 8 percent of cases are durational departures,<sup>65</sup> which are sometimes longer, but more often shorter, than the presumptive duration.<sup>66</sup> About 2 percent of sentences involve *both* a dispositional and a durational departure.<sup>67</sup>

In addition to the formal departure power illustrated above, the Minnesota Sentencing Guidelines do not regulate plea bargaining decisions, and place almost no limits on conditions of non-prison (stayed) sentences. All in all, it is clear that Minnesota judges, prosecutors and defense attorneys retain substantial flexibility to tailor sentences to the specific facts of each case, especially in less serious cases. In practice, mitigating discretion is especially likely to be exercised in the case of a first offender.<sup>68</sup>

Nor should it be assumed that additional flexibility would more effectively achieve rehabilitative and incapacitative goals. Judges' assessments of the treatability and dangerousness of particular offenders may be reliable enough if limited, as they now are under the Guidelines and related sentencing laws, to exceptional cases (departures) and to relatively minor sanctions (stay conditions). However, given the primitive state of our current "science" of prediction, as well as the practical and financial limitations of the criminal justice system, such individualized assessments are likely to be much less reliable if they are routinely attempted in *non-exceptional* cases. In the latter cases, assessments of dangerousness and suitability for probation will probably be more reliable if based on group predictions tied to criminal histories and current of-

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64. In order to compare the tendency to grant mitigated versus aggravated dispositional departures, each type must be evaluated relative to the number of persons *eligible* for that type of departure. See Frase 1993a, *supra* note 3, at 298-99. For defendants with presumptive-executed-prison sentences, the mitigated dispositional departure rate is over 30 percent. 1991 EVALUATION DATA SET, *supra* note 10. Among presumptive-stay cases, only about 4 percent receive an aggravated dispositional departure. *Id.*

65. 1991 EVALUATION DATA SET, *supra* note 10.

66. About two-thirds of all durational departures (including stayed-prison terms) are mitigated. 1990 DATA SUMMARY *supra* note 10, at 40. Among defendants who receive an executed prison sentence, over 30 percent are durational departures, two-thirds of them mitigated. *Id.* at 41.

67. 1991 EVALUATION DATA SET, *supra* note 10.

68. See 1991 DATA SUMMARY, *supra* note 10, at 20; Frase 1993a, *supra* note 3, at 321-23.

fenses.<sup>69</sup> Although the Minnesota Sentencing Commission never officially adopted a group-prediction rationale, its criminal history score does have that effect. Criminological research has shown that offenders with longer criminal histories are more likely to commit further crimes.<sup>70</sup> Under the Guidelines, defendants with lengthy criminal history scores and/or a very serious current offense are, in effect, assumed to be more dangerous and less treatable outside of prison.<sup>71</sup> They receive longer presumptive prison durations, and their cases are more likely to fall below the disposition line, presumptively requiring execution of the prison sentence.<sup>72</sup>

### Prosecutorial discretion

Unlike the Federal Guidelines, the offense scale of the Minnesota Sentencing Guidelines is based almost entirely on the formal elements of the most serious conviction offense; other charges which were never filed, or which were dropped in plea bargaining, have little or no effect on prison commitment and duration decisions.<sup>73</sup> This choice was considered to be necessary in order to preserve legal standards of conviction, that is, proof beyond a reasonable doubt, jury trial, limits on admissible evidence, etc. Sentencing based on unproven facts, so-called "real offense" sentencing, was believed to be less reliable and less fair.<sup>74</sup> However, some critics of guidelines sentencing have argued that any conviction-offense system simply hands over control of sentencing to the prosecutor. By filing a more severe or more numerous charges, or conversely by not filing such charges or by dropping them in plea bargaining, the prosecutor can determine which "box" the defendant ends up in, and thus can limit the court to a narrow sentencing range which may be either too high or too low.<sup>75</sup>

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69. See Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 543-46 (1978) (actuarial predictions of future crime are more reliable than individualized ("clinical") predictions; actuarial predictions should only be based on current offense and prior conviction record).

70. See, e.g., MARVIN WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* 162, table 10.3 (1972).

71. See Frase 1991a, *supra* note 3, text accompanying note 90.

72. *Id.*

73. But see Frase 1993a, *supra* note 3, at 288 n.29 (noting limited "real offense" sentencing permitted under Minnesota Guidelines).

74. See Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993). Other critiques of real-offense sentencing include: Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 757-772 (1980); and Michael Tonry & John C. Coffee, *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES* 152-61 (Andrew Von Hirsch et. al. eds., 1987).

75. See *supra* note 52 and accompanying text.



Although this argument has a certain surface plausibility, it deteriorates on closer inspection. Under-charging — that is, charging which produces a lower sentencing range than a *judge* would have wanted — is probably fairly rare.<sup>76</sup> Prosecutors are advocates, whose job is to argue for the most severe sentence they can. Thus, improper under-charging only occurs when the evidence is too weak to support heavier charges, or when the prosecutor is corrupt, incompetent, or has insufficient resources. However, these problems are likely to prevent adequate punishment under *any* sentencing system; they are not made significantly worse by conviction-offense guidelines, and would not disappear in the absence of such guidelines.

The opposite problem — that of a prosecutor “over charging,” forcing the judge to impose a sentence which is too severe under the circumstances — is potentially more serious. Minnesota’s sentencing guidelines, though, unlike their much-criticized federal counterpart, are presumptive, not mandatory.<sup>77</sup> Minnesota’s guidelines strongly encourage, but do not require, judges to impose presumptive sentences. Moreover, if a case is over-charged as an *evidentiary* matter — that is, if the case is not provable at trial — an effective defense attorney will encourage the defendant to insist on trial. Again, repeal of sentencing guidelines, or relaxation of the conviction-offense limitation, would not eliminate whatever problems of ineffective assistance of counsel there may be.

Thus, although charging decisions by prosecutors under a conviction-offense guidelines system certainly have an impact on sentencing, this impact is limited by a prosecutor’s adversarial preference for higher charges, by the legal requirements of proof, and by the power of judges to depart upwards or downwards from the guidelines sentence. As noted above, judges in Minnesota depart quite frequently, especially to mitigate sentences,<sup>78</sup> so their discretion does not appear to be unduly limited by charging decisions or overly rigid Guidelines. Because most sentences still re-

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76. For example, Minnesota prosecutors, both before and after the adoption of the Guidelines, were especially likely to grant charge reductions to offenders at levels VII through X with low criminal histories. See 1984 COMMISSION REPORT, *supra* note 3, at 78 (1978-1983 charge reduction rates). These are the same offenders to whom judges very often grant mitigating departures. See *id.* at 22-25 (1978-83 prison rates); see also Frase 1993a, *supra* note 3, at 321 (real-offense prison rates, including both charge and sentence mitigations, show significant leniency given to first offenders; same is true for conviction-offense prison rates, reflecting only judge-controlled sentence mitigations).

77. Cf. Tonry, *supra* note 5, at 136-39 (Federal Guidelines are less flexible than Minnesota and other state guidelines).

78. See *supra* text accompanying notes 63-68.

flect plea bargaining, a final sentence reflects the joint decisions of the judge, probation officer, prosecutor, defense attorney, and defendant. The same would *not* be true, however, if the Minnesota Sentencing Guidelines were made more rigid<sup>79</sup> or were replaced with mandatory minimum penalties (discussed below). Such penalties are often not invoked, but when they are, they really do "tie the judge's hands" and turn over control of sentencing to the prosecutor.

#### Counter-Myth: The Guidelines Still Give Judges Too Much Discretion

Underlying repeated proposals to adopt mandatory minimum penalties<sup>80</sup> is the assumption that this would reduce crime and also reduce sentencing disparity. Judges would be forced to give more severe and more uniform sentences to all defendants subject to a mandatory penalty. In other words, "if presumptive sentences are good, mandatory sentences are better." Other critics have suggested an alternate, and somewhat more flexible, variation on this theme, calling for presumptive guidelines to be extended to cover not only prison terms, but also conditions of non-prison sentences.<sup>81</sup> That is: "if presumptive guidelines are good, more inclusive presumptive guidelines are even better."

#### Mandatory minimum prison terms

The reality of mandatory minimum sentences is that they are seldom "mandatory" in practice.<sup>82</sup> The inevitable result of these statutes seems to be that a few unlucky defendants actually receive the more severe minimum penalties while large numbers of other defendants escape these penalties through the exercise of discretion at all levels of the criminal process. Sometimes victims do not report crimes or do not cooperate with prosecutors, out of concern over harsh penalties; police selectively screen out less serious cases; prosecutors decline to charge offenses covered by the mandatory minimum penalties, or agree to drop such charges in return for guilty pleas; and juries sometimes refuse to convict. The result very

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79. Cf. Alschuler, *supra* note 49, at 924-5 (examples of evasion of overly-rigid Federal Guidelines by federal judges, prosecutors, defense attorneys, and probation officers).

80. See *supra* text accompanying notes 58-59.

81. See Morris & Tonry *supra* note 48.

82. See generally U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 10-15 (1991); Michael Tonry, *Mandatory Penalties*, 16 Crime & Justice, 243 (1992); SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-90 125-26 (1993); BLUMSTEIN ET AL., *supra* note 29, at 30, 188-89.

often is *more* disparity not less — some defendants get more severe punishment, many get the same, and some actually get less.

But what about crime control? Don't severe mandatory minimum penalties deter crime more effectively, and incapacitate dangerous offenders by locking them up for longer? No, not necessarily. Since "mandatory" penalties operate very selectively, in practice, they provide little additional incapacitative effect. This is especially true in a state like Minnesota, where the most dangerous repeat violent offenders are already being sentenced to very long terms (see Part C, *infra*).

As for the deterrent effect of mandatory minimum penalties, it must be kept in mind that deterrence is a function not only of severity but also of the certainty and the swiftness with which punishment is delivered.<sup>83</sup> Again, studies of mandatory minimum statutes in other states have found that the first effect of such statutes is to slow down and impede the adjudication process, because more and more defendants refuse to plead guilty and instead start asserting every possible defense.<sup>84</sup> Thus, as severity increases, certainty as well as swiftness of conviction tends to decrease; unreasonably harsh penalties are evaded by exercises of victim and official discretion, and more vigorous defense efforts produce more dismissals and acquittals. If, as some scholars believe,<sup>85</sup> certainty and swiftness of punishment are more important deterrent factors than severity, the overall deterrent effect is unlikely to increase by much, and might even *decrease*.

Yet another defect of mandatory minimum sentences is that, when they are invoked, they allow prosecutors, not judges, to determine sentences.<sup>86</sup> Prosecutors should not wield unchecked sentencing power because they generally lack the experience, the detailed pre-sentence investigation report, and greater neutrality which judges bring to sentencing. Under a mandatory minimum sentencing system, prosecutors have almost unlimited discretion to decide which defendants they will subject to the mandatory penalties and which they will allow to escape (because the charge carrying that penalty is never filed or is dropped in return for the defendant's guilty plea). As noted above, some critics have complained that sentencing guidelines give prosecutors a similar unchecked power to dictate sentences and tie judges' hands. Yet this power is far

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83. See LOW ET AL., *supra* note 26, at 17.

84. See BLUMSTEIN ET AL., *supra* note 29, at 188-89 (reduced conviction rates); U.S. DEPT. OF JUSTICE, POLICY BRIEFS — MANDATORY SENTENCING: THE EXPERIENCE OF TWO STATES 8 (1982) (increased delays in trial and conviction).

85. See LOW ET AL., *supra* note 26, at 18, 20.

86. See *supra* text accompanying note 75.

greater under mandatory sentences than under presumptive guidelines like those in Minnesota, which allow judges to depart in exceptional cases. Such presumptive guidelines strike a much better balance between prosecutorial and judicial control.

### Non-imprisonment guidelines

While proponents of mandatory minimum sentences have claimed that the Guidelines' presumptive prison terms are too discretionary, other critics have objected to the Guidelines because they contain no presumptive rules regulating conditions of non-prison ("stayed") sentences.<sup>87</sup> Because there is a wide variety of commonly-used stay conditions (jail, residential or outpatient treatment, community service, fines, restitution, probation, intensive probation, random drug testing, etc.), any set of guidelines covering all such conditions would be quite complex. Thus, the most common proposal is simply to regulate the overall severity of stay conditions, providing a range of severity "units" for each guidelines cell.<sup>88</sup> A system of "equivalency" scales (or "exchange rates") would provide that each added stay condition contributes a certain number of units toward the overall severity score (e.g., each day in jail adds 1 unit; each day of home detention adds one-half unit; etc.).<sup>89</sup> Judges could select any combination of stay conditions, so long as the aggregate severity score of all such conditions was within the range provided for that guidelines cell. Judges could also "depart" from these ranges, following normal departure criteria and procedures.

Such a system of aggregate-severity non-imprisonment guidelines might have three kinds of desirable effects: 1) preventing the imposition of unduly severe stay conditions; 2) limiting the granting of unduly lenient conditions; and 3) encouraging judges to use a wider variety of stay conditions, especially *non-custodial* sanctions such as day-fines and community service.

As applied to the current Minnesota Sentencing Guidelines, the first effect would be fairly modest, because appellate caselaw already sets upper limits on the aggregate severity of stay conditions. In *State v. Randolph*,<sup>90</sup> the Minnesota Supreme Court held that defendants have the right to demand execution of the presumptive prison term applicable to their case if that term would be less onerous than the trial court's proposed stay conditions. The

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87. See *supra* note 48 and accompanying text.

88. See, e.g., MORRIS & TONRY, *supra* note 48, at 69-81.

89. *Id.* at 75.

90. 316 N.W.2d 508 (Minn. 1982).

*Randolph* rule may help to prevent the imposition of excessive stay conditions, but it does not prevent excessive punishment. When defendants invoke their right to have a sentence executed, the result is usually<sup>91</sup> imprisonment in a presumptive-stay case, without compliance with dispositional departure rules (because appellate courts, under *Randolph*, review neither the justification for the trial court's proposed stay conditions, nor the appropriateness of a prison term). Aggregate severity guidelines would focus attention, at both trial and appellate levels, on the need for unusually severe intermediate sanctions in particular cases. Moreover, the equivalency scales underlying a set of aggregate-severity limits for each cell would provide more useful guidance to trial and appellate courts than the vague "onerousness" standard under *Randolph*.

However upper limits on stay conditions are a "pro-defendant" reform, and might not garner sufficient support inside and outside the Minnesota Sentencing Commission unless combined with lower, i.e., *minimum* limits on aggregate stay-condition severity. Yet, such lower limits may not be feasible or even desirable. Unless they are set very low (which would limit their usefulness and political acceptability), they would raise the following problems.

First, minimum stay-condition limits (unlike maximum limits) have never been tried in Minnesota and would clearly make sentencing more time-consuming and complex. One of the goals of the Commission, and an important virtue of its Guidelines, is simplicity of application.<sup>92</sup> At some point, the costs of further refinement outweigh the benefits. This is particularly likely to occur at the lower end of the sentencing severity continuum. The relatively low maximum severity of stay conditions under *Randolph* (equivalent to prison of 18 months or less, in most cells) limits the potential for significant disparity and under-punishment.

Second, such limits might often require judges to impose stay conditions which serve no purpose other than symbolic punishment, thus wasting scarce correctional resources and violating the Commission's goal of "parsimony" in sentencing (sanctions should be the least severe necessary to achieve the purposes of the particular sentence).<sup>93</sup> Moreover, each additional stay condition increases the odds that the defendant will fail to fully comply with all conditions, and will thus face further (and more expensive) obligations, or even

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91. Almost all *Randolph* requests arise in presumptive-stay cases, but it is possible for the same issue to arise when a judge proposes to depart downward in a presumptive-commitment case.

92. See Frase 1993a, *supra* note 3, at 281-82.

93. See *id.* at 282; Greenawalt, *supra* note 26, at 1342, 1344.

revocation and imprisonment — all for the sake of symbolic uniformity and proportionality goals, unrelated to public safety.

Third, more severe non-imprisonment sanctions reduce an offender's incentive to comply with on-going, crime-preventive or treatment-oriented stay conditions by reducing the "reserved" sentencing power of the court when it revokes probation. Such a reduction in sentencing power would occur because the prison-days equivalent of all completed stay conditions would probably have to be credited to (deducted from) the duration of the offender's prison term (just as jail days are currently credited).<sup>94</sup> Ironically, very lenient stay conditions give offenders the maximum incentive to cooperate with probation and stay out of trouble, because they face execution of the entire stayed prison term — an often overlooked, but highly efficient, form of "specific deterrence."

Fourth, minimum severity standards for stay conditions would be likely to overload available correctional resources in many counties, at least from time to time (because caseloads and resource needs fluctuate much more widely at the county level than in the larger, statewide system).<sup>95</sup>

Fifth, minimum stay condition requirements would eliminate the modest degree of "local control," which the current Guidelines provide in less serious cases, and which allows counties to accommodate regional differences not only in resources and crime rates, but also in sentencing traditions and values.

Sixth, it may prove very difficult to achieve consensus on specific equivalencies for different types of non-prison sanctions. For example, some have argued that offenders view one day of residential treatment as equivalent to *five days* in jail,<sup>96</sup> whereas judges and the public may believe that, if anything, treatment hours should count *less* than jail time.<sup>97</sup>

Finally, minimum stay-condition standards would be very difficult to consistently enforce because most cases of leniency involve

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94. GUIDELINES, *supra* note 2, III.C.

95. See Hans W. Mattick, *The Contemporary Jails of the United States: An Unknown and Neglected Area of Justice* 801-2, in HANDBOOK OF CRIMINOLOGY (Daniel Glaser, ed., 1974) (need for excess capacity in small jails); MINNESOTA SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON THREE SPECIAL ISSUES 19-20, 35 (1990) (noting limited correctional resources of many counties).

96. See Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 703 (1993).

97. *Id.* at 703 (a New Jersey Task Force developed an exchange rate of one day in jail for five days of residential treatment); see also *id.* at 702 (Oregon Guidelines initially treated one hour of community service as equivalent to one hour in jail; "few offenders would agree to exchange three days of work [8 hours a day] for one day [24 hours] of jail").

agreements with the prosecutors, and are not appealed.<sup>98</sup> Even if the prosecution does object, sentencing appeal of highly fact-dependent issues would rarely be worth a prosecutor's time and expense, when the only issue is non-imprisonment sanctions (as opposed to prison commitment and duration).

Given all of these problems, it is not surprising that non-imprisonment guidelines, while often proposed in Minnesota since 1980, have met with almost universal opposition from judges, probation officers, and attorneys.<sup>99</sup> This broad resistance provides perhaps the best "defense" for the Minnesota Sentencing Commission's decision not to promulgate such guidelines. Experience with the existing prison-term Guidelines has shown that, where officials in the field strongly oppose Commission policies, the policies have been evaded.<sup>100</sup>

As noted previously, a third potential benefit of non-imprisonment guidelines is that they might encourage judges to substitute non-custodial sentences for jail terms. Equivalency scales for stay conditions demonstrate in concrete terms that various non-custodial sanctions can be just as "punitive" as custody. But this benefit (and much of the upper-limit effect, discussed earlier) could be achieved simply by promulgating the equivalency scales alone, without specifying either upper or lower limits on aggregate severity per cell. Judges would retain their current discretion, but might impose fewer custodial sentences. The availability of such equivalency scales would also help courts to calculate the overall "onerousness" of proposed stay conditions, under the *Randolph* line of cases.

Still, Minnesota should perhaps go further.<sup>101</sup> For instance, judges could be directed to consider jail or short prison terms as the punishment of last resort, and could be further required, when imposing a custodial sentence, to state reasons why equally punitive non-custodial sanctions were not feasible or appropriate. Such guidelines would be especially helpful if jail or prison terms were being overused. As discussed more fully in Part C, *infra*, prison

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98. Frase 1993a, *supra* note 3, at 316-19; Frase 1991a, *supra* note 3, at 752-53.

99. Frase 1991a, *supra* note 3, at 753.

100. See Frase 1993a, *supra* note 3, at 337.

101. In addition to the proposal in text, another limited use of stay guidelines might be for cases in which a mitigated dispositional departure is granted. Imposition of more punitive stay conditions would serve to lessen the disparity between offenders in the same Guidelines cell who do and do not receive the presumptive prison term. On the other hand, such cases are exceptional, by definition, and thus are less suited to any sort of numerical guidelines. Moreover, a requirement to comply with stay guidelines might unduly discourage trial judges from granting appropriate mitigating departures.

terms have always been very sparsely used in Minnesota, but it is at least arguable that jail terms have been imposed too often. However, a presumption in favor of a non-custodial sentence, backed up by required reasons and appellate review, would raise some of the problems previously noted above, in the context of minimum stay condition standards (e.g., greater complexity, variations in local conditions). Until further experience is gained in the application of voluntary equivalency standards (e.g., the day-fine and community service model recently adopted by the Minnesota Sentencing Guidelines Commission),<sup>102</sup> it seems unwise to impose across-the-board stay requirements.

### Summary

In my view, the current Minnesota Sentencing Guidelines provide the right balance between uniformity and flexibility. Attempts to significantly reduce flexibility and discretion would make the Guidelines too rigid; if carried too far, such inflexible guidelines would, like mandatory minimum sentencing laws, simply be evaded. At the same time, further substantial increases in allowable discretion would risk re-introducing the wide disparities which led to sentencing guidelines in the first place.

### *B. Allowable Sentencing Purposes*

#### Myth: The Minnesota Guidelines are too Retributive

Those who increasingly call for greater flexibility in guidelines sentencing sometimes appear to assume that guidelines are inherently based on a retributive, offense-based, "just deserts" model which rejects offender-based goals such as rehabilitation and incapacitation.<sup>103</sup> The trouble with sentencing guidelines, such critics argue, is that treatment and supervision in the community are appropriate in many cases, and may be much cheaper and better for public safety in the long run. Meanwhile, other critics of guidelines seem to feel that some offenders are especially dangerous, and must be sent to prison for as long as possible, without regard to the limitations of a "just deserts" model.<sup>104</sup> In other words, some critics want flexibility to mitigate for rehabilitative purposes;

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102. See MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 14-33 (1993) (describing the day-fine and community service model recently adapted by the Minnesota Sentencing Guidelines Commission).

103. See *supra* text accompanying note 50.

104. See, e.g., GOVERNOR'S COMM'N ON VIOLENT CRIMES, EXECUTIVE SUMMARY 2 (1991) (proposing that "predatory offenders" convicted of certain violent crimes be sentenced under a separate sentencing grid, including provisions for life without parole).



others want greater authority to selectively lengthen sentences, to incapacitate.

Both of these criticisms reflect a serious misunderstanding of existing sentencing guidelines, particularly those in Minnesota. No existing guidelines system, state or federal, is premised entirely on a retributive theory of punishment, or entirely rejects rehabilitation and incapacitation as sentencing goals. The Minnesota Sentencing Commission has stated that its Guidelines are based on a "modified just deserts" theory, and some writers have sought to strongly emphasize the retributive aspect of the Guidelines (see below). However, the Minnesota Sentencing Guidelines themselves clearly reject any extreme "just deserts" theory, and the importance of rehabilitative and incapacitative purposes has grown steadily under the Guidelines since their inception.

About seventy-five percent of defendants sentenced under the Guidelines have presumptive non-prison ("stayed") sentences. In these cases, the Guidelines explicitly recognize that all traditional goals of punishment, including both rehabilitation and incapacitation, may be considered by the sentencing court in setting conditions of the stayed sentence. In addition, as noted above,<sup>105</sup> the use of criminal history scores under the Guidelines implicitly recognizes both rehabilitative and incapacitative theories.

Finally, appellate caselaw and post-implementation legislation have both increased the role of rehabilitation and incapacitation. Caselaw under the Guidelines recognizes that, in exceptional cases, courts have the power to depart from presumptive prison or non-prison disposition based upon individualized assessments of an offender's amenability to probation. Thus, a defendant with a presumptive prison-commitment sentence may still receive a non-prison sentence if the court finds that he or she is particularly amenable to probation (a high proportion of these cases involve first offenders).<sup>106</sup> Conversely, a defendant with a presumptive stayed-prison sentence may, in exceptional cases, be sent to prison if the court finds that the defendant is not amenable to probation (usually because the defendant previously failed to cooperate with probation).<sup>107</sup>

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105. See *supra* text accompanying notes 69-71.

106. See Frase 1993a, *supra* note 3, at 324-28; Frase 1991a, *supra* note 3, at 740-48. For a discussion of a similar line of cases under the Federal Guidelines, see Richard S. Frase, *Defendant Amenability to Treatment or Probation as a Basis for Departure Under the Minnesota and Federal Sentencing Guidelines*, 3 FED. SENTENCING REP. 328 (1991) [hereinafter Frase 1991b].

107. See, e.g., *State v. Park*, 305 N.W.2d 775 (Minn. 1981), discussed in Frase 1991a, *supra* note 3, at 741, 743-45, 747.

Similarly, the Minnesota Legislature has increasingly enacted new sentencing laws to incapacitate particularly dangerous offenders, and has given more and more explicit recognition to treatment and incapacitation goals.<sup>108</sup> Such legislation is troubling because it has the potential of re-introducing significant sentencing disparities and causing prison overcrowding, and also tends to undermine the Minnesota Sentencing Commission's independence and control over sentencing policy. However, these adverse effects have not yet become a serious problem because the Legislature has thus far limited the new sentencing laws to narrowly-defined and low-volume categories of offenders.

#### Counter-Myth: The Guidelines are not Retributive Enough

Some supporters of guidelines sentencing view all of these caselaw and legislative developments with alarm. They believe that sentencing ought to be purely retributive and offense-based, and that any recognition of crime prevention goals and offender-based sentencing is anathema.<sup>109</sup> They have argued that the Minnesota Sentencing Guidelines were initially successful because of their strong emphasis on "just deserts;" a single, dominant sentencing purpose supposedly lends greater coherence to the drafting and implementation of sentencing rules.<sup>110</sup> These critics might also argue that, in selecting a single purpose, "just deserts" is the best choice because offender-based, utilitarian goals such as rehabilitation and incapacitation are more likely to lead to disparity, permitting judges to favor white, middle-class offenders over racial minorities and the poor. Alternately, some of these critics may have assumed that, if sentencing is to become less discretionary, then it must, *of necessity*, become more retributive — in other words, that offender-based, utilitarian sentencing requires discretion, while retributive sentencing does not.

The latter proposition is clearly false; reduced sentencing discretion does not inevitably require either greater emphasis on retributive goals or rejection of utilitarian aims. Discretion serves *all* traditional purposes of punishment. With respect to "just deserts," broad discretion allows courts to consider all aggravating and mitigating culpability factors, in order to "make the punishment fit the crime."<sup>111</sup> Conversely, reduced discretion limits the power of a

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108. See Frase 1993b, *supra* note 3, at 360-63.

109. See *supra* note 51 and accompanying text.

110. See, e.g., PARENT, *supra* note 3, at 34-39.

111. See Frase 1991b, *supra* note 106, at 332; Alschuler, *supra* note 49, at 902, 909-10; Greenawalt, *supra* note 26, at 1339. The sentencing goal which probably requires the least individualized discretion is general deterrence, *Id.* at 1341, at

court to fine-tune its retributive as well as its utilitarian assessments.

It is equally false to assume that the Minnesota Sentencing Guidelines were, at their inception at least, primarily retributive, or that their success was due to their retributive nature. As I have argued at greater length elsewhere,<sup>112</sup> the Minnesota Sentencing Guidelines have *always* been a hybrid, giving substantial weight to offender-based, utilitarian sentencing goals as well as to "just deserts." This also appears to be what the Legislature intended originally<sup>113</sup> (and, as noted above, still does). Moreover, a recent assessment of successes and failures of the Guidelines since their inception concluded that the Commission's attempt to emphasize retributive values — to give more weight to offense seriousness, and less to offender variables — was relatively unsuccessful even in the early years of the Guidelines, particularly in the sentencing of first offenders.<sup>114</sup>

Despite what the Commission and certain "just deserts" theorists *said* about sentencing philosophy, the fact is that the original Guidelines did very little to reduce the role of utilitarian, offender-based sentencing. Based on pre-Guidelines patterns of offense and prior record, over 80 percent of felons sentenced under the new rules were expected to receive a presumptive stayed-prison sentence.<sup>115</sup> The conditions of these stays (and decisions to revoke the stay) were to be determined according to *all* traditional purposes of punishment. The most important role of retributive values in such cases was to determine the duration of the presumptive stayed-prison term. (Retributive values apparently did not underlie presumptive stayed-prison *dispositions*; if the Commission believed that prison-commitment was "undeserved" in such cases, it should have required stay revocations (as well as aggravated dispositional departures) to be based on findings of culpable conduct by the defendant, and should not have allowed judges to continue to base these decisions on "technical violations" (non-criminal conduct) and other indicia of "unamenability" to probation.))

For the remaining one-fifth of defendants, the presumptive prison-commit disposition and narrow durational range could be

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least if one rejects "exemplary" sentences as too unfair or disparate. Cf. Norval Morris, *Punishment, Desert and Rehabilitation*, in ZIMRING & FRASE, *supra* note 29, at 736, 741 (arguing that occasional, very severe penalties, intended "to capture public attention and to deter . . . by a dramatic punishment," are not unjust).

112. See Frase 1993b, *supra* note 3, at 352-54.

113. *Id.* at 348-9.

114. Frase 1993a, *supra* note 3, at 299, 301-3, 319-26, 335, 337.

115. 1978 DISPOSITIONAL DATA SET. This data is described in 1984 COMMISSION REPORT, *supra* note 3, at 20, and in 1980 COMMISSION REPORT, *supra* note 2, at 4.

viewed as primarily based on retributive values. However, the Guidelines do not state that departures from these terms must be based on retributive grounds, nor did the Commission initially, or subsequently, take any steps to insure that these presumptive terms are not evaded or distorted by prosecutorial charging or plea bargaining decisions based on utilitarian grounds. Thus, even the strongest "just deserts" advocates on the Commission must have realized that, in practice, utilitarian considerations would continue to strongly influence the vast majority of felony sentences in Minnesota.

Given the pervasive influence of utilitarian, offender-based sentencing goals under the original Guidelines, and the increasing importance of these goals in light of subsequent appellate caselaw and legislation (described above), it would not be surprising to find increased evidence of sentencing disparity and race or class bias. However, as discussed later in this Article,<sup>116</sup> evaluations of the early post-Guidelines years found that such disparity and bias had been significantly reduced in comparison to pre-Guidelines sentencing. Furthermore, a recent evaluation of sentencing patterns in the late 1980s<sup>117</sup> found surprisingly little evidence of bias in sentencing, even in the application of such race and class-sensitive criteria as "amenability" to probation.

### Summary

The genius of the Minnesota Sentencing Guidelines is that they have found a way to accommodate *all* of the traditional goals of sentencing. The Guidelines recognize upper, and occasionally lower,<sup>118</sup> retributive limits on sentencing severity (and thereby also increase uniformity), while still allowing courts to consider rehabilitative and incapacitative purposes. The Guidelines, as originally written, actually reflected more of a "limiting" than a "defining" retributive scheme.<sup>119</sup> They have further evolved into a hybrid which is more balanced than the Commission's original "modified just deserts" model, and is also more likely to survive. The public and criminal justice officials in Minnesota (and elsewhere) are strongly committed to pursuing crime control sentencing goals. If guidelines

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116. See *infra* text accompanying notes 147-164.

117. See Frase 1993a, *supra* note 3, at 308-16, 326-28.

118. Upper limits are set by the Guidelines durational ranges, which are infrequently exceeded. See *supra*, text accompanying notes 65-67. As for lower limits, the patterns of dispositional departures indicate that judges believe some violent offenses must almost *always* receive a prison term. See Frase 1991a, *supra* note 3, at 746-47 n.90.

119. See *supra* text accompanying notes 27-28.

do not openly accommodate these goals, they will be evaded or rejected.

### C. Sentencing Severity

#### Myth: Minnesota Guidelines Sentences are too Lenient

Underlying recurring calls for mandatory prison sentences, longer prison terms, and stricter conditions of non-prison sentences, is the assumption that sentencing is very lenient in Minnesota.

The reality is rather different from this assumption, and leniency, of course, is a relative term. So the question is, lenient compared to what? Compared with sentences under the old indeterminate system in Minnesota, and with the most recent data on sentences in other states, the Guidelines' sentences for *violent crimes* — the crimes which most acutely concern the public and elected officials — are quite severe and always have been. Sentences for non-violent crimes are less severe, although a very high percentage of offenders receive local jail sentences. These patterns are consistent with the Minnesota Sentencing Commission's policy decision to reserve scarce and expensive state prison space for violent offenders.<sup>120</sup>

For the most serious, violent offenses (those ranked at severity levels seven, e.g., armed robbery, or higher), both the percentage of offenders receiving prison terms, and the average duration of imprisonment prior to parole release, increased under the Guidelines. In 1981, the first year of the Guidelines, the prison rate increased 11 percent and the average prison time-served increased by five percent.<sup>121</sup> From 1981 to 1988, the prison rate for high severity offenses fell by 14 percent (due in part to an increase in certain high-probation crimes such as child sex abuse),<sup>122</sup> but the average prison time-served increased by 22 percent,<sup>123</sup> thus increasing overall "weighted" severity (prison frequency times average dura-

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120. See 1984 COMMISSION REPORT, *supra* note 3, at 21; 1980 COMMISSION REPORT, *supra* note 2, at 9-10, 15.

121. 1978 Dispositional and Durational Data Sets, *supra* note 10; 1981 In-Depth Data Set, *supra* note 10. These comparisons are based on *alleged*-offense data, not conviction offense, to avoid distortions caused by major charging changes under the Guidelines, see Frase 1993a, *supra* note 3, at 299-303. It should also be noted that the pre-Guidelines (1978) data on sentence durations is actual time served in prison, whereas post-Guidelines durations are estimated by assuming that offenders will earn the *maximum* good-time reduction. Thus, all post-Guidelines durations are *understated*, although probably not by much. See 1984 COMMISSION REPORT, *supra* note 3, at 101 (median good-time days "lost" varied from 4.5 to 22, depending on sentence length).

122. MINN. SENTENCING GUIDELINES COMM'N, 1988 DATA SUMMARY 1, 7 (1990).

123. 1988 Data Set, *supra* note 10; 1981 Evaluation Data Set, *supra* note 10.

tion) by about four percent. As of 1991, prison rates had fallen even further, but sentence durations had increased substantially, yielding an increase in overall weighted severity of about 13 percent since 1988 (and 18 percent, since 1981).<sup>124</sup>

In comparison with other states, Minnesota sends a lower percentage of felons to prison. According to the most recent national survey, 44 percent of felons received a prison term in 1988,<sup>125</sup> compared to about 20 percent of Minnesota felons.<sup>126</sup> But again, this difference is mainly confined to sentencing of non-violent crimes, where other states use prison sentences and Minnesota more often uses short jail terms.<sup>127</sup> For the most serious violent crimes, Minnesota prison rates are equal to or higher than the national average. For example, the same national survey found that in 1988, 91 percent of defendants found guilty of murder or non-negligent manslaughter were sentenced to prison nationally,<sup>128</sup> while in Minnesota the percentage varied between 95 and 99 percent, in 1988 through 1991.<sup>129</sup> Moreover, Minnesota average prison durations for these homicide offenses were much longer than the national average: from 35 to 100 percent longer, depending on the year and the conservativeness of parole release estimates.<sup>130</sup> As for forcible rape, the national study reported that 69 percent of defendants were sentenced to prison in 1988.<sup>131</sup> In Minnesota, the percentages in 1988 through 1991 varied between 77 and 85 percent.<sup>132</sup> The average prison duration for rape was somewhat shorter in Minnesota than the average for all states, but this would be expected,

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124. 1991 Data Set, *supra* note 10.

125. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN, FELONY SENTENCES IN STATE COURTS, 1988, Table 2 (1990).

126. Frase 1993a, *supra* note 3, at 331-32.

127. By one measure — overall felony custody rates (prison or jail sentence) — Minnesota is much *more* severe than the national average: 85 percent of felons sentenced in 1991 received an executed custody sentence. 1991 DATA SUMMARY, *supra* note 10, at 5-6. In contrast, a recent national survey found that only 69 percent of felons received either a prison or a jail sentence. U.S. DEPT. OF JUSTICE, *supra* note 125, at 2, Table 2.

128. *Id.* (murder category contains non-negligent manslaughter).

129. 1988 through 1991 Evaluation Data Sets, *supra* note 10. The latter data excludes life sentences, which are not covered by the Guidelines. Data on the number of such inmates received in prison each year was obtained from Mr. Kenneth E. Larimore, Information and Analysis Unit, Minnesota Department of Corrections.

130. *Id.* In computing these durations, it was necessary to estimate the time each inmate would serve. For Guidelines sentences, it was assumed that all inmates would receive the maximum Good-Time reduction (1/3 off). However, for life sentences imposed after 1988, it was not possible to identify which inmates in the total for each year were covered by the 30-year minimum term applicable as of August 1, 1989 (for crimes committed before that date, the minimum term was 17 years).

131. DEP'T OF JUSTICE, *supra* note 125, at 2, Table 2.

132. 1988 through 1991 Evaluation Data Sets, *supra* note 10.

given the higher prison rate — imprisonment of more marginal offenders tends to lower the average duration of terms (and vice versa). Overall rape sentencing severity (prison frequency times duration) in Minnesota is about equal to the national average.<sup>133</sup>

### Counter-Myth: Guidelines Sentences are too Severe

Attempts to refute the first criticism, above, unfortunately tend to give support to the counter-charge that guideline sentencing is too severe. Indeed, some critics have argued that the greater visibility of guidelines or other determinate sentencing reforms inevitably attracts politically-motivated upward "adjustments" in sanction severity, which can no longer be quietly undercut by later parole release discretion.<sup>134</sup> This "visibility-vulnerability" problem has even led some critics to argue for a return to the old parole-release system.<sup>135</sup>

It is probably true that increased pressures to escalate severity are inherent in any more uniform sentencing scheme. The goal of uniformity (as well as the separate concerns for openness and honesty in sentencing) would seem to require the promulgation of written standards, and such standards cannot long be kept secret from victims, politicians, and the media. Yet if this is true, then the return of the Parole Board would not solve the visibility-vulnerability problem: in an age of required governmental openness and accountability, parole boards would have to devise — and publish — some sort of parole-release guidelines, which would be just as visible and vulnerable as the Minnesota Sentencing Guidelines. Nor is there any reason to assume that a re-established Parole Board would be more wise or more insulated from political pressures than the Minnesota Sentencing Commission. For better or worse, we are probably stuck with the visibility-vulnerability problem. We cannot put the sentencing reform genie back in the bottle.

But the defense of Minnesota's approach need not rest merely on claims that it is *no worse* than the parole system. We need to put things in perspective: in a period when national jail and prison populations were going through the roof,<sup>136</sup> and crime rates were

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133. It is not possible at this time to evaluate the relative severity of Minnesota sentencing for other violent crimes (e.g., robbery, assault), due to lack of sufficiently comparable offense definitions and charging practices across jurisdictions.

134. See *supra* text accompanying notes 53-56.

135. See Albert W. Alschuler, *Monarch, Lackey, or Judge*, 64 U. COLO. L. REV. 723, 729 (1993).

136. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISONERS IN 1992 1, Table 2 (1993) (168 percent increase in prison inmates, from 1980 to 1992); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN, JAIL IN-

increasing rapidly in Minnesota, sentencing severity under the Guidelines remained remarkably stable, and increases in severity were rarely the result of politically-motivated adjustments in Guidelines terms. As noted above, sentencing of violent offenders became more severe, but this was originally the *Commission's* policy, not the Legislature's, and it would seem to be the most rational use of scarce and expensive prison space. The increases were also fairly gradual. Most of the increases in violent crime penalties did not occur until 1989, almost a decade after the Guidelines went into effect. Even if one believes (as I do), that the 1989 increases were unnecessary and unwise, they were at least understandable: violent-crime arrests had more than doubled since the early 1980s.<sup>137</sup> Furthermore, to the extent that punitive attitudes increase with increasing racial tensions (as offenders come to be seen as "them," not "us"), it should be noted that ethnic diversity was increasing dramatically in Minnesota during this period; the non-white population doubled in the 1980s, and the non-white proportion of sentenced felons was also increasing steadily — from 18 percent, in 1981, to 30 percent, in 1991.<sup>138</sup>

If one looks at the broader picture, overall sentencing severity has remained remarkably stable. The percentage of convicted felons sentenced to state prison has held steady at about 20 percent since the mid-70s, and the average duration of prison time served hovered around 25 months from 1980 through 1989.<sup>139</sup>

More and more felons were receiving jail sentences as a condition of probation: while only 35 percent of all convicted felons received jail sentences in 1978, this figure had risen to 58 percent by 1988, and 66 percent, by 1991.<sup>140</sup> But this steep rise in jail sentencing since 1978 is not strong evidence for the "visibility-vulnerability" hypothesis. First of all, jail sentences under the Guidelines are imposed by judges, with practically no direct guidance from either the Commission or the Legislature. Second, the gradual increase in the use of jail sentences appears to have begun before the Guide-

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MATES 1992 2, Table 1 (1993) (number of jail inmates more than doubled from 1982 to 1992). See also *infra*, text accompanying note 144.

137. Adult arrests for murder and non-negligent manslaughter, rape, robbery and aggravated assault went up 105 percent, from 1983 to 1988 (most of this increase was in aggravated assaults — up 137 percent; lesser assaults were up even more: 157 percent). Adult drug arrests had also increased substantially since 1983 — up 57 percent. (Data obtained from Mr. Ray Lewis, Research Analyst, Statistical Analysis Center, Minnesota Planning Office.)

138. U.S. BUREAU OF THE CENSUS, DECENNIAL CENSUS OF POPULATION 1980 (1981); U.S. BUREAU OF THE CENSUS, DECENNIAL CENSUS OF POPULATION 1990 (1991); 1991 DATA SUMMARY, *supra* note 10, at 10 (conviction data).

139. See Frase 1993a, *supra* note 3, at 332.

140. 1991 DATA SUMMARY, *supra* note 10, at 21.



lines went into effect.<sup>141</sup> Third, most of the increase in jail sentences in the first year of the Guidelines occurred in cases with presumptive non-prison sentences, as judges substituted jail for the prison terms they had formerly imposed (thus producing a net *decrease* in sentencing severity in these cases).<sup>142</sup> Fourth, some of the increase in the jail rate through the late 1980s may have derived from an increase in the average seriousness of felony cases.<sup>143</sup> With limited prison space, and a strong Commission policy of avoiding prison overcrowding (discussed below), jail sentencing would be expected to increase.

Finally, the broadest measure of punitiveness — total inmate populations in prisons and jails relative to arrest rates — showed virtually no change in Minnesota, from the mid-1970s through 1991 (whereas, for the nation as a whole, overall custodial sentencing severity increased by about 80 percent).<sup>144</sup> Thus, it appears that increased felony jail sentencing must have been balanced by a decrease in the use of jails for pretrial detention and/or misdemeanor sentencing — again, a very defensible use of limited jail space, and one which is consistent with the Commission's sense of custodial priorities.

Still, as noted before, the pressures to "adjust" highly visible guideline sentences upward are inherent, and will continue to plague the Minnesota Guidelines — or any other foreseeable sentencing scheme. Uniformity, openness, and accountability are appropriate, widely-held values, and they are here to stay. The best we can do is to try to make these values work in *favor* of more rational sentencing: for example, by making sure that legislators and other elected policy-makers receive full *information* about the costs of proposed severity increases compared with less costly alternatives, and are forced to take *responsibility* for the long-term consequences and costs (including increased disparity)<sup>145</sup> of their

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141. See Frase 1993a, *supra* note 3, at 332.

142. Among alleged offense presumptive non-prison cases, prison terms decreased by 10 percent and jail terms increased by 11 percent, from 1978 to 1981. 1978 and 1981 Evaluation Data Sets, *supra* note 10.

143. The mean offense severity and criminal history score of sentenced felons increased by 7 and 51 percent, respectively, from 1981 to 1989, and the percentage of Guidelines cases with presumptive prison-commitment sentences increased from 15 percent, in 1981, to 25 percent in 1989. 1981 and 1989 Evaluation Data Sets, *supra* note 10.

144. See Richard S. Frase, *Sentencing Guidelines in Minnesota and Other American States: A Progress Report*, in (Oxford Univ. Pr., forthcoming 1994), figure 7. See also *id.*, figure 6 (between 1978 and 1992, increases in total prison and jail inmate populations in Minnesota closely paralleled increases in the number of felony cases sentenced).

145. See *supra* text accompanying note 82.

punitive proposals. As discussed more fully below, this information-and-accountability function is one of the most important roles of a sentencing commission.

### Summary

It is impossible to completely satisfy all critics, particularly in an area as politically sensitive as sentencing severity. The best we can do is attempt to reach an acceptable and relatively stable compromise. Viewed in this light and considering both the galloping increases in sentencing severity in other states, *and* Minnesota's recent dramatic increases in violent and drug crimes, increases in sentencing severity under the Minnesota Sentencing Guidelines have been very modest and quite gradual. Moreover, these increases have occurred primarily in cases of violent crimes, which is consistent with the Minnesota Sentencing Commission's policies.

### III. Appreciating What the Minnesota Guidelines have Achieved

In the remainder of this article, I would like to highlight what I believe are the three most significant accomplishments of the Minnesota Sentencing Guidelines.<sup>146</sup> These accomplishments are well known to most informed observers, or once were. But, recent criticisms suggest that we all need a reminder.

#### A. *Reducing Sentencing Disparity and Racial Bias*

Early studies of the Minnesota Sentencing Guidelines found that they were successful in making sentences more uniform for offenders with similar conviction offense and prior records.<sup>147</sup> My own studies of the evolution of the Guidelines through the late 1980s confirm that they continue to be effective in reducing sentencing disparity, particularly in minimizing disparities related to race.<sup>148</sup>

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146. Other important goals of the Guidelines are increased proportionality; openness and honesty of sentencing decisions; simplicity of application; and "parsimony" (using the least severe sanction needed in each case). See Frase 1993a, *supra* note 3, at 281-2.

147. See Miethe & Moore, *Socioeconomic Disparities*, *supra* note 3, at 352-55 (table 2).

148. See Frase 1993a, *supra* note 3, at 308-16, 326-28. The data sets available for the latter study included race but not social class variables; to the extent that the latter variables are strongly correlated with race (i.e., if minorities tend to have consistently lower levels of employment, education, income, etc.), then the minority "race" variables studied reflected the combined effects of race *and* social class. A failure to find statistically significant effects for these "race" variables thus implies

When I began to study the extensive computerized data on cases sentenced under the Guidelines, I expected to find that the discretionary choices still permitted under the Guidelines tended to favor white offenders. In particular, I expected to see such favoritism in mitigating and aggravating departures from the Guidelines' imprisonment rules,<sup>149</sup> and in the largely unregulated discretionary decisions to impose jail as a condition of a non-prison sentence.<sup>150</sup> Instead, I found that none of these types of decisions revealed evidence of substantial racial disparity.<sup>151</sup> Thus, although a lower percentage of blacks receive mitigating departures, this difference disappears when one takes into account other factors which traditionally determine the severity of punishment: factors such as the nature and seriousness of conviction offenses; whether the offender was on probation or parole at the time of an offense; defendants' prior records of convictions; and whether a defendant pled guilty. To the extent that there is any consistent bias evident in recent Guidelines sentencing, it appears to be directed against the unemployed, of all races,<sup>152</sup> and against males, which in part probably reflects leniency toward women with dependent children.<sup>153</sup>

In May 1993, the Minnesota Supreme Court released a report concluding that there is still racial bias in felony sentencing.<sup>154</sup> Given the long history of overt as well as covert racial discrimination in this country, including Minnesota,<sup>155</sup> this finding is not surprising. But for present purposes, the important questions are narrower: how *much* bias is there in felony sentencing, and is it less than what existed before the Guidelines? The Minnesota Supreme Court's study did not address the latter question, but as noted above, earlier researchers found that race bias decreased under the Guidelines.

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that the correlated social class variables, if measured independently, would also not be significant.

149. See *supra* text accompanying notes 63-67 (explaining the different types of departure and the percentages of sentences that receive each type of departure).

150. See *supra* text accompanying notes 87 and 115.

151. See Frase 1993a, *supra* note 3, at 310 (table 2), 313 (table 3), 315 (table 4), 327 (table 8).

152. See Debra L. Dailey, *Prison and Race in Minnesota*, 64 U. COLO. L. REV. 761, 774 (table 6) (1993).

153. See Frase 1993a, *supra* note 3, at 315-316.

154. MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT S-19 (1993) [hereinafter TASK FORCE REPORT].

155. See, e.g., Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990) (showing bias existed in handling of Dakota Uprising trials in 1880s); Larry Oakes, *A Lynching in Duluth: Residents Taking Steps to Heal 71 Year-Old Wounds*, STAR TRIB. (Minneapolis), Oct. 26, 1991, at 1A (recounting story of lynching of three black youths in Duluth in the 1920s).

As for the degree of bias in sentencing, the supreme court's study actually found that statistically significant racial disparity only existed for certain sentencing decisions (prison commitment) involving certain offenses (forcible rape, aggravated robbery and second degree (armed) assault),<sup>156</sup> and was not present in prison duration decisions or in the imposition of jail sentences in felony cases.<sup>157</sup> Even as to prison commitment, racial disparity was much greater in one year (1990) than over a longer time period (1986-91).<sup>158</sup> It should be noted further that the Minnesota Supreme Court's studies generally did not evaluate socio-economic variables strongly correlated with race (e.g., employment at time of sentencing),<sup>159</sup> which can have a disparate impact on minorities. Sentencing based on such variables might still be viewed as class bias, but it is not a case of racial bias *per se*; indeed, some minority offenders *benefit* from consideration of such factors.<sup>160</sup> Finally, it is important to note that the Supreme Court's studies controlled for conviction offense within statutory offense categories, and did not examine individual case files to determine whether aggravating and mitigating factors (e.g., injury to the victim; repetition of the same crime) might justify different treatment of seemingly similar cases.<sup>161</sup>

Of course, Minnesotans must continue to be vigilant and to guard against racial bias in sentencing, especially in a period of increasing ethnic diversity and heightened public concern over crime.<sup>162</sup> Officials and researchers must also seek to identify and eliminate reasons why so many more minority offenders have more severe conviction offenses and more substantial criminal histories, thus giving them more severe presumptive sentences.<sup>163</sup> Finally,

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156. Significant racial disparity was also found in a third category, "weapons offenses," but this category overlaps with (i.e., includes) armed robbery offenses. TASK FORCE REPORT, *supra* note 154, at Appendix D4, 7-13 (Analysis of Sentencing Guidelines 1986-1990: Imprisonment Rates and Departure Data for Minnesota Felons).

157. *Id.* at 5-6 (prison duration); *id.* at Appendix D-2, 18-19 (jail sentences).

158. *Id.* at 7-13. See also David Peterson and Paul Gustafson, *Accuracy or Advocacy? Bias Report Challenged*, STAR TRIB. (Minneapolis), June 27, 1993, at 1B (discussing differences).

159. See *supra* note 148 and text accompanying note 152.

160. See Dailey, *supra* note 152, at 774, table 6 (mitigating departure rate for employed African Americans was 82 percent, compared to only 70 percent for employed White offenders).

161. The Sentencing Guidelines Commission's in-depth analysis of 1981 and 1982 sentences found that factors justifying an aggravated departure were more often present in cases involving minority offenders. 1984 COMMISSION REPORT, *supra* note 3, at 66-67.

162. See *supra* notes 57, 138.

163. Cf. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 754, 759 (1993) (arguing that nonwhites are represented in prison far out of proportion to their numbers in the general popula-

the Commission may need to revisit the difficult issues of how to treat factors such as an offender's employment status (which has a disparate impact on minorities) and child custody responsibility (which tends to favor female offenders). The Guidelines clearly state that departures may not be based on such factors. Judges, attorneys and probation officers seem to disagree. Perhaps renewed efforts should be made to rule out such factors, although this would hurt some minorities and many women and children.<sup>164</sup> Yet in addressing these issues, and in striving to maintain and improve sentencing fairness, everyone should recognize and appreciate the greater degree of racial neutrality which has already been achieved under the Guidelines, and which would be lost if the Guidelines were repealed or made more discretionary.

### B. *Avoiding Prison Overcrowding and Court Intervention*

Although sentencing guidelines are usually seen primarily as a means of reducing sentencing disparity, an equally important function of guidelines is to permit states to more accurately predict future prison populations, and thus avoid serious overcrowding.<sup>165</sup> Overcrowded prisons are dangerous and self-defeating, breeding more crime than they prevent.<sup>166</sup> Overcrowding also forces states to adopt desperate, "back-door" release programs<sup>167</sup> (thus undercutting the certainty and honesty of punishment), and eventually

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tion — especially in northern, "liberal" states, such as Minnesota; this disparity is mostly due to fact that minorities have much higher arrest rates for serious offenses, subject to long prison terms).

164. See Dailey *supra* note 152 (showing minorities sometimes benefit from mitigation accorded to employed offenders).

Disparity reduction often means "levelling up" rather than down. For example, in 1991 the Minnesota Supreme Court held that under the state constitution, crack cocaine offenders could not be punished more severely than powdered cocaine offenders, because the former are mostly minority offenders while the latter are mostly white. The Minnesota Legislature promptly "solved" this disparity problem by raising all powder penalties to equal those for crack, thus making penalties more uniform, but also more severe for offenders (including minorities) charged with powdered cocaine offenses. See Frase 1993b, *supra* note 3, at 363.

165. See Frase 1993b, *supra* note 3, at 372-73; Frase 1993a, *supra* note 3, at 329-33; Frase 1991a, *supra* note 3, at 733-36.

166. See, e.g., Steve Lerner, *Rule of the Cruel: How Violence is Built Into America's Prisons*, NEW REPUBLIC, October 15, 1984, at 17-21 (describing violent conditions in overcrowded prisons); Mattick, *supra* note 95, at 801 (as jails become more crowded they become increasingly less secure, and also less sanitary).

167. See *Florida Court System Puts Criminals Back on Streets, Officials and Citizens Say*, STAR TRIB. (Minneapolis), Sept. 27, 1993, at 9A (recent rash of fatal attacks on tourists is due in part to early release of thousands of violent offenders, due to overcrowding).

leads to expensive litigation and court interventions in prison administration.<sup>168</sup>

Although Minnesota prison populations have doubled since the Guidelines went into effect, the increase has occurred slowly enough to stay within expanding capacity and avoid serious overcrowding and double-bunking of maximum-security inmates.<sup>169</sup> During the same period, prison populations at the national level increased by 168 percent, resulting in very serious prison overcrowding, routine multiple-bunking, and court intervention in most states.<sup>170</sup>

As prisons become more and more overcrowded, they become less and less safe. Some people may not care very much what prisoners do to each other, although everyone ought to at least care what they do to prison guards and staff. But, we must recognize that almost all of these prisoners will eventually be released back into society. As prisons become more violent and uncontrolled, the prisoners they release back into society become more likely to continue and even escalate their criminal behavior. An old Civil Rights protest song, "Here I am in This Low Down Jail," put it succinctly:

Oh, listen, Cap'n, want you to know,  
You got to reap jes' what you sow.<sup>171</sup>

Nor should any state welcome the disruption and cost of long-term federal court intervention in prison administration.

Thus, it is no surprise that, since the late 1980s, more and more states have adopted Minnesota-type guidelines as a means of predicting and controlling the growth of prison populations. Presumptive sentencing guidelines, because they limit the discretion of judges and correctional authorities, allow states to make much more accurate predictions of how many offenders will be committed to prison in a given time period, and how long they will remain in prison. Although such predictions are necessarily imprecise,<sup>172</sup> Minnesota's experience shows that they are accurate enough to per-

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168. See U.S. GENERAL ACCOUNTING OFFICE, PRISON CROWDING: ISSUES FACING THE NATION'S PRISON SYSTEMS 29 (1989) (as of April 1989, 35 states and the District of Columbia faced court orders dealing with prison overcrowding).

169. See Richard S. Frase, *Prison Population Growing Under Minnesota Guidelines*, 4 OVERCROWDED TIMES, Feb., 1993, at 1, 12.

170. See *supra* note 136 (indicating inmate population increases); Frase 1993a, *supra* note 3, at 330, table 9 (overcrowding); U.S. GENERAL ACCOUNTING OFFICE, *supra* note 168, at 29 (court orders and/or consent degrees related to overcrowding had been issued in 35 states, as of April 1989).

171. Lawrence Gellert, *Here I Am in This Low Down Jail*, NEGRO SONGS OF PROTEST (American Music League, 1936), quoted in RONALD GOLDFARB, JAILS: THE ULTIMATE GHETTO 1 (1975).

172. See Frase 1991a, *supra* note 3, at 734-35.

mit prison construction, expansion, and other adjustments to keep ahead of rising prison populations.

### C. *Promoting More Informed and Balanced Sentencing Policy*

The third major advantage of commission-based sentencing guidelines results from the commission structure itself. Although sentencing commissions are ultimately responsible to the legislature and to the people of a state, they do not face the immediate electoral pressures which confront legislators. Thus, they are less likely to be unduly swayed by the sort of public hysteria which periodically occurs following a series of particularly violent and highly publicized crimes.<sup>173</sup> Some critics of commission-based guidelines might consider this lack of immediate political responsiveness and accountability to be a defect,<sup>174</sup> but the same criticism could be made of other forms of intentional *un*responsiveness which are part of our democratic system — for example, the system of checks and balances between different branches of government, and the elaborate procedures required to amend the constitution. Sometimes, the wisest course of action is to resist an immediate hue and cry, and to take a long-term view of problems and their possible solutions.

Another major advantage of the commission concept is that, like other specialized administrative agencies, a commission can conduct extensive research and develop an overall plan which is balanced, internally consistent, and fully recognizes the complexity of the issues. Thus, as noted above, the Commission was able to create and refine the first state-wide prison population prediction model. This model allows the Commission to warn the legislature of the need to increase prison capacity, and also lets elected officials, their constituents, and the Commission know immediately what eventual prison population consequences will result from any proposed change in sentencing rules. As suggested earlier, this "early warning system" is a key ingredient in forcing elected officials to admit and take responsibility for the costs of politically-motivated sentencing proposals.<sup>175</sup>

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173. See Frase 1991a, *supra* note 3, at 729-30; VON HIRSCH ET AL., *supra* note 74, at 7.

174. See generally John C. Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEORGETOWN L. REV. 975, 1042 (1978).

175. Cf. CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, A NATIONAL APPROACH TO THE PREVENTION AND CONTROL OF VIOLENT AND OTHER SERIOUS CRIME: SUMMARY OF RECOMMENDATIONS (1990) (recommending all proposed federal crime legislation should

In addition to its prison population projections, the Commission has also monitored all sentences and departures under the Guidelines and has carried out more detailed research on sentencing in particular types of cases. Were it not for budget limitations, the Commission also might have conducted additional research on topics such as prosecutor charging and plea bargaining;<sup>176</sup> factors behind recent increases in felony caseloads and supervised release revocations;<sup>177</sup> equivalency scales and other ways of encouraging judges to use non-custodial sanctions;<sup>178</sup> and a whole host of other matters which properly bear on sentencing policy.

The Commission has not, thus far, conducted such broad-scale research, and actually has had difficulty doing the minimum amount of research necessary to perform its functions. The sad reality is that Minnesota Sentencing Guidelines reform has been run on a shoestring budget. Indeed, the Commission's budget has been reduced over the years.<sup>179</sup> Moreover, the legislature also has shown an increasing tendency to take back some of the delegated responsibility for setting sentencing policy. In 1989, for example, the Legislature ordered the Commission to increase presumptive sentences for certain offenses by specified amounts.<sup>180</sup> There also has been a tendency to blame the Guidelines Commission for doing exactly what the 1978 enabling statute directed it to do: avoid prison overcrowding.<sup>181</sup>

All of these trends — chronic underfunding, legislative micro-management of sentencing guidelines policy, and retreat from the state's long-standing commitment to a responsible prison policy — threaten to undermine the Commission's independence and its continued ability to control sentencing disparity and prison overcrowding. Of these trends, the reduced concern about prison capacity limits is particularly troubling. It suggests that some legislators are willing to engage in "credit card sentencing policy" — the enactment of severe penalties with no consideration of whether the state has, or will ever have, money available to pay for them. Such irre-

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be required to contain a fiscal impact statement, showing projected effects on court and probation caseloads, prison populations and crime).

176. See Frase 1993a, *supra* note 3, at 303, 335 n.130 (arguing need for better "real offense" data).

177. See Frase, *supra* note 169, at 10.

178. See *supra*, text accompanying notes 101-102.

179. See Frase 1993b, *supra* note 3, at 369, 376-77; Frase 1991a, *supra* note 3, at 753.

180. See Frase 1993b, *supra* note 3, at 361.

181. See Frase 1993b, *supra* note 3, at 349. In 1989, the Legislature amended the Guidelines enabling act to specify that the Commission's primary consideration in setting sentencing policy should be public safety, not existing resources. *Id.*



sponsible sentencing proposals seem particularly ironic at a time when we are all trying to recover from the disastrous consequences of the debt-ridden 80s.

#### IV. Conclusion

Fifteen years ago, Minnesota led the nation in sentencing reform and showed that Commission-based, presumptive guidelines can effectively reduce disparity, avoid prison overcrowding, and promote more informed and balanced sentencing.

Lately, some critics seem to have forgotten these advantages, and have called for overhaul or repeal of the Guidelines. As I have argued in this article, many of the most common criticisms are based on misconceptions, and are mutually inconsistent. The Minnesota guidelines are neither unduly rigid nor too loose; they limit discretion, but still provide plenty of flexibility to tailor sentences to the needs of an individual case,<sup>182</sup> based not only on "just deserts" but also on rehabilitative and incapacitative goals.<sup>183</sup> Nor are the Guidelines either excessively lenient or unreasonably severe. Sentencing severity has increased for violent crimes. But reduced severity in the sentencing of less serious cases has allowed Minnesota to maintain a stable rate of incarceration relative to its crime rate — while the rest of the country has experienced dramatic increases in sentencing severity.<sup>184</sup> Finally, it should not be assumed that the frequent and diverse criticisms reflect deep-seated problems with the Guidelines, or the need for fundamental changes. On the contrary, such conflicting objections provide strong proof that the Guidelines have struck appropriate balances in the key areas of judicial discretion, purposes of punishment, and severity of sanctions. On each of these three dimensions, compromise is essential. Criticism from "both sides" shows that the Guidelines are *working*, not that they have failed.

The Guidelines today represent a wonderfully creative synthesis of all of the conflicting goals and limitations of punishment: they balance uniformity and flexibility, and give appropriate weight to all major purposes of punishment. At the same time, they also respect limitations set by existing prison capacity, by the delays inherent in expanding that capacity, and by the important competing demands on limited state budgets — schools, roads, health care, etc. Considering the complexity of these factors, and the highly

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182. See *supra*, text accompanying notes 61-102.

183. See *supra*, text accompanying notes 103-119.

184. See *supra*, text accompanying notes 120-145.

emotional nature of sentencing issues, this careful balance is all the more impressive.

All sentencing systems, including the Minnesota Guidelines, must continue to evolve and respond to the times. But the answer to any remaining problems in the Guidelines is not to repeal them; nor should the Legislature continue to enact more and more laws expanding discretion in some cases and attempting to eliminate it in others.<sup>185</sup> The Legislature must resist the temptation to micro-manage sentencing policy — that is what the Guidelines Commission is for. Instead, legislators must strive to give the Sentencing Guidelines Commission the respect and support it needs to continue to do its job. That support includes adequate funding, legislative respect for the integrity and internal consistency of the Guidelines system, and careful attention to the makeup of the Commission to insure its continued quality, representativeness, and balance.

The present guidelines system in Minnesota is not perfect. But it is far better than any other sentencing structure yet devised — better than Minnesota's former indeterminate sentencing system and better than most determinate sentencing reforms, particularly the Federal Sentencing Guidelines. In some respects, the Minnesota Guidelines are better today than they were when first enacted, because they reflect a more reasonable and politically realistic balance between retributive and crime-control purposes.

Other states continue to create sentencing commissions and guidelines modelled after Minnesota's, and the American Bar Association has recently amended its recommended sentencing standards<sup>186</sup> to adopt all of the essential features of Minnesota-style, Commission-based presumptive sentencing (without, it must be noted, ever using the term "guidelines" — such is the negative influence of the Federal version). In particular, the ABA recommends that every state create an "intermediate" agency (i.e., between the legislature and the courts) to promulgate presumptive sentences, study sentencing practices and effects, predict future correctional populations, and match sentencing policies with correctional resources.

The ABA's approach, like that in Minnesota (and unlike the Federal Guidelines), reflects a careful balance between the conflicting goals and limitations of punishment. Uniformity and retributive proportionality are given greater emphasis, but sufficient flexibility is retained (especially to mitigate sentences) to accommo-

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185. See *supra*, text accompanying notes 59-60.

186. See *supra* note 1.

date important utilitarian goals, resource limits, and individual offense and offender variations. The ABA, like Minnesota, gives particularly strong emphasis to the matching of sentencing policy to available correctional resources, so as to avoid overcrowding and desperate "back door" releasing devices which undercut the credibility of legislative and judicial pronouncements. These accomplishments are made possible by the sentencing commission's relative insulation from short-term political pressures, and by its detailed information base, system-wide perspective, and expertise in research, planning, policy formulation, and guidelines implementation. A sentencing commission can also contribute significantly to the development of more refined sentencing policies, particularly in the emerging area of non-imprisonment sanctions.<sup>187</sup>

The key features of this model appear suitable for adoption in states without presumptive guidelines but with similar reform objectives. However, the experience in some states and at the federal level suggests caution; sentencing guidelines do not *guarantee* insulation from short-term politics or the absence of prison overcrowding.<sup>188</sup> The best prospects for achieving the latter benefits would appear to exist in jurisdictions which, like Minnesota, are willing to make a strong commitment to rational and fiscally responsible sentencing policy. More and more states, faced with correctional budgets escalating out of control, now appear willing to make that commitment.

It is always hazardous to predict the future course of legal reforms, particularly in so volatile an area as sentencing. But Minnesota-style guidelines have represented the dominant approach to sentencing reform since the late 1970s;<sup>189</sup> moreover, the values such guidelines seek to promote — especially the avoidance of prison overcrowding, misallocation of prison space, and excessive discretion — are here to stay, and no better way has yet been found to promote them. The future of sentencing guidelines, although uncertain at the federal level, seems bright in the states. As for the original prototype, the future of the Minnesota Sentencing Guidelines should likewise be assured, provided Minnesotans and their elected officials develop a better understanding of how the Guidelines work, and what they have accomplished.

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187. See generally MORRIS & TONRY, *supra* note 48.

188. See generally Frase, *supra* note 144; Michael Tonry, *The Politics and Processes of Sentencing Commissions*, 37 CRIME & DELINQ. 307 (1991).

189. *Id.*